United Nations AT/DEC/1167

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1167

Case No. 1232: OLENJA
No. 1279: OLENJA

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Ms. Brigitte Stern, Vice-President, presiding; Mr. Omer Yousif Bireedo; Mr. Spyridon Flogaitis;

Whereas, on 11 March 2002, Charles Olenja, a former staff member of the United Nations, filed an Application ("the first case") requesting the Tribunal, inter alia:

"2.9. ... [To order the United Nations Population Fund] (UNFPA) to pay [the Applicant] compensation equivalent to thirty-six months' net base salary for:

(i) The irregular application of [the] Staff Regulation and Rules governing termination of permanent appointment and suspension from duty ...;

(ii) The failure of UNFPA and [the United Nations Development Programme (UNDP)] management to respect [the Applicant's] entitlement to due and fair process; and refusing to make a decision on the findings contained in the UNDP Joint Review Body [(JRB)]Report ...

2.10. ... [To order] UNFPA to pay [the Applicant] compensation for annual leave of 150 days ... lost during the five years of [his] forced [special leave with full pay (SLWFP)] ...

2. 11 ... [To order] UNFPA to [reimburse the Applicant] the deduction of Kshs. 13,190 from [his] March 1998 salary ...

...

3.1. [To order the rescission] of the recommendation of the Nairobi [Joint Appeals Board (JAB)] that '***The appeal against the decision to issue the staff member with a reprimand is rejected***' ...

3.2 [To order] the removal of ... all ... correspondence leading to the reprimand from [the Applicant's] Official Status file.

4. [To order] UNFPA to pay [the Applicant]:

4.1. Within-grade salary increments effective 1 January 1997 to date ...

4.2. ... [C]osts in the amount of Kshs. 33,281.80 ...

5. [To order] ... UNFPA to pay [the Applicant] ... [US$] 896,000 ... for damages resulting from the manner in which UNFPA management has treated [him] between 1992 and 2002 ...

..."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer in the "first case" until 30 June 2002 and periodically thereafter until 31 July 2003;

Whereas on 19 November 2002, the Applicant filed an Application in the "second case", requesting the Tribunal, inter alia, to order:

"1.1. The nullification of the decision of the UNDP Administrator to wrongfully dismiss [the Applicant] ...

1.2. [The Applicant's] re-instatement into the UNFPA service ...

1.3. The removal of the letter of 28 May 2002 of the UNDP Administrator ... and all correspondence and materials on [the Applicant's] dismissal ... from [his] Official Status file.

1.4. The UNDP Administration to pay [the Applicant] salary, pension entitlements, annual leave, within-grade salary increments, child allowance, medical claim expenses and promotion from 14 June 2002 (the date of dismissal) to the date of implementation of the judgement on this case (date of re-instatement).

1.5. The UNDP Administration to pay [the Applicant] compensation in the amount equivalent to three years' ... net base salary in damages ...

...

2.1 The UNDP Administration to pay [the Applicant] the accrued ... annual leave ...

2.2. The UNDP Administration to pay [the Applicant] compensation equivalent to 15 months' ... net base salary for delaying by 62 months ... to make a decision on the proposed termination of [the Applicant's] permanent appointment. ...

2.3. The UNDP Administration to refund [the Applicant] communication costs ... in the amount of [Kshs. 33,281.80] ...

..."

Whereas on 28 January 2003, the Applicant filed a supplementary submission in the "second case", inter alia amending his pleas as follows:

> "2.5 [To order] UNFPA ... to award [the Applicant] within grade salary increment that was due on 1 January 1997, and pay [him] all the outstanding arrears from the payments effected to [him] while in the service of UNFPA ...
>
> ..."

Whereas the Respondent filed his Answer in the "first case" on 31 July 2003;

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer in the "second case" until 30 April 2003 and periodically thereafter until 24 October 2003;

Whereas the Respondent filed his Answer in the "second case" on 24 October 2003;

Whereas the Applicant filed Written Observations in the "second case" on 14 January 2004;

Whereas on 12 March 2004 the Respondent submitted an additional communication in the "first case";

Whereas the Applicant filed Written Observations in the "first case" on 12 April 2004;

Whereas, on 15 June 2004, the Respondent submitted comments on the Applicant's Written Observations in the "first case" and in the "second case" and, on 14 July 2004, the Applicant commented thereon;

Whereas the facts common to both cases are as follows:

The Applicant joined UNFPA, Kenya, on a one-month temporary assistance appointment as a Programme Assistant at the G-8 level, on 16 April 1980. His appointment was subsequently extended several times and, on 1 October, it was converted to a fixed-term appointment. Effective 1 October 1985, the Applicant was granted a permanent appointment. At the material time, he was serving as a National Officer Category C, to which level he had been promoted effective 1 January 1992.

The Applicant's performance review reports for the years 1980 to 1991 consistently rated his overall performance as that of "an excellent staff member whose performance exceeds expected standards."

In March 1992, a new UNFPA Country Director arrived in Kenya and, within days of her arrival, decided not to have any certifying officer other than herself. Subsequently, the Applicant could no longer certify payments.

The Applicant's overall performance for 1992 was rated "3" ("meets the expectations of the performance plan"). His overall performance for 1993 was rated "4" ("needs some improvement") as was his performance for 1994. However, following a rebuttal, his 1994 rating was changed to "3" ("Fully satisfactory").

In May 1994, the Applicant was seconded to UNDP Kenya Office.

On 14 December 1994, the UNFPA Country Director decided, based on the Applicant's poor performance, not to recommend him for a within grade salary increment and, on 27 March 1995, the Resident Representative, UNDP, Kenya, wrote to UNFPA Headquarters concerning the Applicant, stating, inter alia: "We shall have to decide in the coming months what can be done with a staff member who has clearly been misled by former Country Directors and promoted beyond the level of his competence". On 10 November 1995, the new Resident Representative informed UNFPA Headquarters that UNDP did not wish to continue the Applicant's secondment beyond the end of 1995 and that his return to UNFPA would be counter-productive. He therefore recommended that the Applicant be separated from service for poor performance, effective 31 December 1995. In its response, UNFPA agreed with the evaluation of the Applicant's performance and suggested a no-contest agreed termination with termination indemnity. Subsequently, on 24 November, the Applicant was informed of the above, however, he indicated that he would not accept a no-contest agreed termination.

On 29 December 1995, the Applicant submitted to the Resident Representative a "Report on Work Performed in UNDP, Nairobi in 1995". In this Report, the Applicant made a number of complaints regarding his work environment and harshly criticized UNDP/Kenya Office.

On 4 January 1996, the UNFPA Country Director informed the Applicant that his separation from the Organization was "under review". On 7 January, the Country Director informed the Resident Representative that the Legal Adviser, UNFPA, had concluded that there were currently no grounds on which the Applicant could be put on SLWFP. She added that "if the 1995 PAR report is not fully satisfactory, then this, together with the two previous years' reports, will constitute sufficient documentation for submission to a Joint Review Group." On 8 January the Applicant returned to UNFPA and requested clarification on the statement that his separation was "under review".

On 10 January 1996, the Applicant submitted his 1995 PAR to his UNDP supervisor.

On 16 February 1996, the Applicant wrote to the Resident Representative and, referring to a meeting held between them, stated, inter alia, that he had "declined" to discuss his 1995 PAR with the Resident Representative, as he was not his supervisor for the period under review.

Subsequent correspondence ensued and, on 22 February 1996, the Applicant submitted his 1995 PAR, duly completed and signed, to the Resident Representative. The Applicant's overall performance for 1995 was rated "4" ("Needs Improvement in Some Important Areas"). Following an appeal, this rating was changed to "3" ("Fully satisfactory").

Additional correspondence and meetings, between the Applicant on the one hand, and the UNFPA Country Director and the Resident Representative on the other hand, on the subject of his possible separation took place and, on 12 June 1996, once again an offer for agreed termination was made. On 14 August the Applicant rejected the offer, making a counter proposal, and bringing allegations of mismanagement and harassment against senior management in the Kenya Field Office. On 23 September, the Applicant was informed that his allegations were being investigated and requested to substantiate each allegation. According to the Applicant, in September and October 1996, he informed UNFPA, Kenya, that he would be unable to go on a scheduled field trip or finalize some of his reports because he had to respond to the 23 September letter. On 18 October, the Applicant submitted his "Statement of Substantiation".

On 27 November 1996, the Applicant was informed that he would not receive a within-grade salary increment, due on 1 January 1997, pending the resolution of his 1995 PAR rebuttal. The Applicant replied that the salary increment in question should be based on his 1996 performance.

On 30 January 1997, the Applicant informed the UNFPA Country Director that pending the investigation, "it was illegitimate" for him to submit his 1996 PAR to her as his supervisor. Subsequently, on 24 February, the Applicant was informed that, refusal to submit his 1996 PAR may be construed as insubordination, and furthermore, the process of reviewing his 18 October submission did not relate to who his supervisor was.

On 12 March 1997, the Management Review Group (MRG) concluded that the Applicant's failure to submit his 1996 PAR "was considered to be an act of serious misconduct and of insubordination". Consequently, the MRG recommended that the Applicant be separated from service and that he be suspended from duty with full pay, pending resolution of the case. On 20 March, this recommendation was forwarded to UNFPA Headquarters and copied to the Applicant.

Whereas the facts in the "first case" are as follows:

On 9 April 1997, the Applicant was informed that the "administrative review", conducted subsequent to his allegations, had concluded that the Applicant's accusations were "totally unfounded" and that might constitute misconduct. The Applicant was also informed that this letter would be considered as a Letter of Reprimand and that it would be placed in his

Official Status file. He was further informed that the reprimand would be taken into consideration in connection with the review of his performance.

On 10 April 1997, the Resident Representative was notified that the UNFPA Administration had decided to accept the 12 March recommendation of the MRG. On 23 April, the Applicant was informed that his case would be submitted to a local JRB for termination of his permanent appointment and that in order to allow him to prepare for the review of his case, he would be placed on SLWFP, effective 25 April until a decision was reached on his case.

On 20 April 1997, the Applicant requested the Secretary-General to review the administrative decision to reprimand him

On 6 June 1997, the Applicant submitted his comments to the JRB.

On 10 July, the Applicant requested the Secretary-General to review the administrative decision to place him on SLWFP.

On 24 July 1997, the Applicant lodged an appeal with the JAB in Nairobi, contesting both decisions.

On 12 May 1998 the JRB submitted its report. On the issue of "unsatisfactory service", the JRB found that no sufficient grounds existed to terminate the permanent appointment of the Applicant for unsatisfactory service. On the issue of "unsatisfactory conduct", the JRB concluded that

> "[the Applicant had] failed to comply with obligations under the Charter of the United Nations, the Staff Rules and Regulations, and the standard of conduct expected of him. This amounts to unsatisfactory conduct ... [warranting] the imposition of disciplinary measures for misconduct."

Accordingly, the JRB panel recommended that

> "[the Applicant] be suspended without pay for a period not exceeding one month or an agreed separation. [sic.] If a suspension is effected, consideration may also be given to assigning [the Appellant] to a Project for a very limited period of time in the form of a training programme to overcome any deficiency in performance. ... The JRB's recommendation is based on the fact that its finding of misconduct is not of the level that may warrant a recommendation of separation".

The JAB adopted its report on 19 July 2001. Its considerations and recommendations read, in part, as follows:

> "Considerations
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> ...
>
> **2. The appeal against the decision to issue the staff member with a reprimand**

The panel ... concluded that the appeal of the Appellant could only be successful if the issuing of the reprimand was in any way contaminated by arbitrariness, extraneous motives or other specious reasons.

... The panel took note of the fact that some of the comments made by the staff member in the document concerned were indeed of a potentially highly defamatory nature ...

...

... [T]he panel finds that issuing the Appellant with a reprimand was a reasonable and justified exercise of discretion by [the] [A]dministration.

3. The appeal against the administrative decision to place the staff member on special leave with full pay.

...

The panel finds that the reason for putting the staff member on special leave with full pay has in the meantime become [moot] as the JRB submitted its report in June 1998 and the staff member could have reasonably expected a decision on the separation from service within a reasonable time period after the submission of that report.

However, nothing of the sort has occurred and therefore the decision to put the staff member on special leave with full pay should be rescinded as soon as possible.

The panel considered that the exceedingly long period during which the staff member unjustly remained on special leave with full pay warrants compensation. In determining the amount the panel took into account that the staff member had always received his full salary and therefore finds that one month's net base salary is adequate compensation.

...

Recommendations

...

2. The appeal against the decision to issue the staff member with a reprimand is rejected;

3. The appeal against the decision to place the staff member on special leave with full pay pending the JRB proceedings is no longer justified and the decision should be rescinded.

For the prolonged period for which the staff member was unjustly placed on special leave with full pay he should be paid one month's net base salary compensation."

On 31 January 2002, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him, inter alia, as follows:

"The Secretary-General shares the concern of the Board concerning the long period that you have been on suspension with pay. However, he does not consider that the decision should be rescinded, as this would have the effect of invalidating the decision *ab initio*. The Secretary-General has decided to terminate your suspension with immediate effect and to compensate you in the amount recommended by the Board. ..."

On 11 March 2002 the Applicant filed with the Tribunal the above-referenced Application in the "first case".

On 8 April 2002, the Applicant was reinstated in service.

Whereas the facts in the "second case" are as follows:

On 8 February 1999, the Applicant was informed of the forthcoming institution of charges against him (insubordination and defamation (libel and slander)) and of referral of his case to a Joint Disciplinary Committee (JDC).

On 22 February 2002, the JDC submitted its report. Its considerations, conclusions and recommendation read, in part, as follows:

> "VII. Considerations
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> ...
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> 71. The panel ... concluded that insubordination constitutes an act of misconduct ...
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> ...
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> 73. ... The panel agrees with the staff member that his placement on Special Leave With Full Pay for a period of several years is completely unjustifiable and should not have occurred ... It ... accepts that the proper forum for this issue is the Joint Appeals Board and not the Joint Disciplinary Committee ...
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> 74. ... The Committee concluded that while this violation of the due process rights of the staff member was serious, it did not result in a procedural flaw of such grave importance as to void the whole process. ...
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> ...
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> 85. 2.2. Regarding the refusal to submit his 1996 PAR, the panel finds that the staff memoer has submitted no defense that would justify this case of insubordination. ...
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> ...
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> 90. 2.3. The charge of not having gone on the field trip to Mombasa is an allegation that could not be substantiated by the evidence submitted by [the] Administration. ... [T]he panel took note of the staff member's letter to the ... Resident Representative of 8 November 1996 in which he explained that he had received approval of the then Officer-in-Charge of UNFPA ... to withdraw from the three day Mombasa trip. ... There is ... no evidence available that this explanation was disputed by the Resident Representative. ...
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> ...
>
> 92. 2.4.1. ... [T]he allegation not to accompany [the then Officer-in-Charge of UNFPA] to the women's bureau meeting in Machakos has not been explained to the satisfaction of the panel.
>
> 93. ...Consequently, the Committee concludes that ... he has committed an act of insubordination.
>
> 94. 2.4.2. [The staff member was exonerated from the allegation of suspension of work for a period of three weeks.]

95. 2.5. [The Committee finds the staff member not guilty of misconduct regarding his failure to comply with deadlines.]

96. 2.6. Regarding the staff member's refusal to further carry out his assigned duties ... the panel concludes that the staff member is guilty of insubordination.

...

98. 2.7. The panel also finds the staff member guilty of insubordination concerning his refusal to submit the '5 [Country Programme] Logical Framework'.

...

99. ... [T]he panel felt that while these acts of insubordination were serious they did not rise to a level that would warrant separation from service or summary dismissal. However, the panel felt that they were serious enough to warrant a sanction that will impress on the staff member that such conduct is not tolerable within the organization and that ensures that future repetition is excluded. In the opinion of the panel, the appropriate sanction is a demotion to the next lower level and a fine of one-month net base salary.

...

IX. Recommendation

101. The panel therefore recommends that the staff member be demoted to the next lower level and be fined one month net base salary."

On 28 May 2002, the Administrator, UNDP, transmitted a copy of the JDC report to the Applicant and informed him, inter alia, as follows:

"I have taken note of the Committee's findings that you were guilty of five of the seven charges of insubordination, and that in the remaining two there was insufficient evidence of misconduct. I have also taken note of the Committee's finding that you have repeatedly refused to carry out your assigned duties and to follow the instructions of your supervisors, in violation of your obligations under the Charter, the Staff rules, and the Standards of Conduct in the International Civil Service ...

Your conduct, as set out in the JDC report as well as the JRB report, violates the Staff Regulations and Rules and amounts to unilateral repudiation of your contract of employment, for which the appropriate sanction is dismissal.

Your dismissal shall be effective at the close of business on the day on which you receive this letter. In accordance with the Staff Rules and Regulations, you will be paid a termination indemnity not exceeding half of the indemnity that would have been payable under Annex III, paragraph (a) to the Staff Regulations, plus compensation in lieu of notice under Staff Rule 109.3."

On 19 November 2002, the Applicant filed the above-referenced Application in the "second case" with the Tribunal.

Whereas the Applicant's principal contentions in the "first case" are:

1. The Applicant's rights of due process were violated and there were procedural irregularities in his case.

2. The Applicant was subjected to harassment over a number of years.

3. The statements the Applicant made against some of his supervisors are true and do not amount to defamatory language, thus not warranting a reprimand.

4. The Applicant's reputation and professional prospects have been destroyed.

5. The procedure followed in placing the Applicant on SLWFP for an unduly lengthy period was in violation of the Staff Regulations and Rules.

Whereas the Respondent's principal contentions in the "first case" are:

1. The decision by the Respondent to issue a reprimand against the Applicant was a valid exercise of the Respondent's discretion.

2. The Respondent's decision to issue a reprimand against the Applicant was not arbitrary or motivated by extraneous factors.

3. The decision to place the Applicant on SLWFP was a valid exercise of the Respondent's discretion.

4. The Respondent has already acknowledged that it was no longer justified to retain the Applicant on SLWFP around or after June 1998 and he has been adequately compensated for injuries he may have suffered as a result of being on unjustified SLWFP after June 1998.

Whereas the Applicant's principal contentions in the "second case" are:

1. The Applicant's rights of due process were violated.

2. The Administrator's decision was based upon a mistake of fact and law.

3. The Administrator's decision is severe and disproportionate.

Whereas the Respondent's principal contentions in the "second case" are:

1. The decision by the Administrator, UNDP, to separate the Applicant from service is not based on mistake of fact or law and is not disproportionate or too severe or an abuse of the Administrator's discretion.

2. The Applicant's due process rights have been fully respected and there was no procedural irregularity.

3. The Applicant's claim for damages of an amount equivalent to three years of the Applicant's net base salary is without merit.

4. The Applicant's claim for accrued service credits is moot.

5. The Applicant has been adequately compensated for the injuries he may have suffered as a result of the decision to separate him from service being unduly delayed.

The Tribunal, having deliberated from 5 to 23 July 2004, in Geneva, now pronounces the following Judgement:

I. The Applicant has brought two different cases before the Tribunal: cases No. 1232 and 1279. The Tribunal has decided to join the two cases as they arise out of the same basic facts. In case No. 1232, the Applicant appeals from two decisions: the decision to issue him with a reprimand, dated 9 April 1997, and the decision to place him on SLWFP, effective from 23 April 1997. Case No. 1279 stems from the Respondent's decision to dismiss the Applicant from service for insubordination.

The Applicant appeals to the Tribunal to nullify the decision of the Respondent to wrongfully dismiss him; to rescind UNFPA's decision to issue him with a reprimand; and, to find that the decision to place and to retain him on SLWFP was not a valid exercise of the Respondent's discretion. The Applicant additionally claims compensation for 150 days of annual leave, accumulated during the period when he was placed on SLWFP, as well as three years' net base salary and US$ 986,000.00 in damages and compensation for the manner in which he was treated.

II. The Tribunal will first address the issue of the written reprimand with which the Applicant was presented on 9 April 1997.

In December 1995, the Applicant submitted to the Resident Representative a "Report on the Work Performed in UNDP, Nairobi in 1995" which was critical of the way he was treated while on secondement with UNDP, of his working environment and of his colleagues. In August 1996, the Applicant again brought allegations of mismanagement and harassment. The Applicant was subsequently requested to substantiate his claims, which he attempted to do, stating, inter alia, that "the root cause of my problems in UNDP/UNFPA is personal vendetta between the UNFPA Country Director, the UNDP Resident Representative and myself arising out of my inability to engage with them in extra-mural counterproductive and immoral activities". The Tribunal notes that the JAB had determined that the Applicant "did not offer any evidence, either by documentation or by witnesses, to support his allegations". A determination to this effect was also made following an "administrative review", which had concluded that the Applicant's allegations were false, grave and totally unfounded. Consequently, the Applicant was issued with a letter of reprimand, which was also placed in his Official Status file.

The Tribunal is satisfied that in issuing the Applicant with a reprimand, the Respondent acted within his authority. The Tribunal has consistently recognized the Secretary-General's authority to exercise broad discretion in disciplinary cases, including the

right to determine whether a staff member has met the required standard of conduct and the authority to penalize staff members in cases of misconduct. The Tribunal has established its own competence to review such decisions. Thus, the Tribunal will not interfere with the Respondent's discretion in disciplinary matters, unless such decision is tainted by extraneous factors, is arbitrary or in cases where the decision is vitiated by prejudicial factors, by significant procedural irregularity, by a significant mistake of fact or by failure to accord due process. (See Judgements No. 542 *Pennacchi* (1991); No. 815, *Calin* (1997); and, No. 941, *Kiwanuka* (1999).) While noting that under staff rule 110.3(b) a reprimand is not considered a disciplinary measure, the same principles, nevertheless, apply.

The Tribunal accepts the JAB's finding that the Applicant's above-mentioned Report, as well as the subsequent documents he had circulated, "were indeed of a potentially highly defamatory nature" and that the Applicant failed to provide evidence in support of the allegations contained in them. Moreover, the Applicant failed to prove that any extraneous factors had been involved in reaching the decision to issue the reprimand. The Applicant's claim in this regard must therefore fail.

III. The Tribunal will next turn its attention to the Applicant's appeal against the decision to place him on SLWFP. In order to fully understand the context of this claim, it is necessary to look back at the events which ultimately lead to this decision.

It is evident to the Tribunal that the Applicant had an excellent record of performance during 1980-1991, during which period his performance was consistently rated as that of "an excellent staff member whose performance exceeds expected standards". His problems began with the arrival of a new UNFPA Country Director, in March 1992. Within days of her arrival in Kenya, she had requested that there be no alternate certifying officer and thus, the Applicant would no longer serve in that capacity. Subsequently, the Applicant's PARs for 1993, 1994 and 1995 initially rated his performance as "4" ("needs improvement in some important areas"). However, following rebuttals and an appeal to the JAB, his 1994 and 1995 PARs were changed, reflecting a rating of "3" ("fully satisfactory").

In May 1994, the Applicant was seconded to UNDP and, on 27 March 1995, the UNDP Resident Representative addressed the issue of the Applicant's employment, stating, inter alia, the following:

> "[T]he case is as complex as ever. We shall have to decide in the coming months what can be done with a staff member who has clearly been misled by former Country Directors and promoted beyond the level of his competence. It is obvious to me that [the Applicant's] return to the UNFPA Nairobi's Office would disturb and possibly undo the positive relationships that are now developing so well."

On 10 November 1995, the new Resident Representative, UNDP, reiterated this position, reaffirming that the Applicant's return to UNFPA would be counter-productive and that UNDP did not wish to continue the Applicant's secondment beyond 31 December 1995.

It is clear to the Tribunal that the heads of UNFPA and UNDP, Kenya, did not want to continue the Applicant's employment with the Organization, and that to this end various possibilities were explored. The Applicant was first offered a no-contest agreed termination, which he declined. Then the Administration attempted to place him on SLWFP, but the Legal Adviser opined that the circumstances of the case did not provide grounds for placing the Applicant on SLWFP. The next step was an attempt to terminate the Applicant's appointment for poor performance. The Applicant's case was submitted to a local JRB, which ultimately determined that there was no sufficient ground for terminating the Applicant's permanent appointment for unsatisfactory performance, nor for unsatisfactory conduct. Pending resolution of his case, the Applicant was placed on SLWFP, effective 25 April 1997, a status in which he remained until 8 April 2002. The final step was the decision to dismiss the Applicant for misconduct and insubordination.

The Tribunal finds that there is no justification for placing a staff member on such an extended SLWFP and that the Respondent had failed to give an explanation for imposing on the Applicant a SLWFP for a period of five-years. The Tribunal has previously held that:

> "SLWFP is a measure used only in exceptional circumstances. It is normally used for short periods of time, for instance, until a new position is found for a staff member. It must also be borne in mind that SLWFP may amount to a sanction against the staff member subject to it, when used in cases where it is not justified. Such a measure must never be adopted without ensuring that the rights of the staff member are guaranteed and should never amount to a veiled attempt to discipline a staff member without due process. ...
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> The Tribunal is satisfied that important material and moral damage was inflicted on the Applicant ...
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> Furthermore, the anguish of being left without functions to perform, for a prolonged period of time ... constitutes a moral damage, that must be compensated ..." (See Judgment No. 925 *Kamoun* (1999).)

In the present case, the period during which the Applicant was left on SLWFP was even longer than that in the case of *Kamoun* (*ibid.*) and unlike that case, in the Applicant's case, the Respondent did not even make a perfunctory attempt at finding the Applicant alternative employment. Moreover, the reason given for placing the Applicant on SLWFP seems, at best, questionable; the Applicant was informed that the SLWFP was to afford him the time needed for preparing his response and presentation to the JRB. However, whilst the JRB issued its report on 30 June 1998, the Secretary-General had not decided on the Applicant's reinstatement until 31 January 2002 and the Applicant was not actually reinstated until 8 April

2002. The Tribunal finds this to be unacceptable. The Tribunal notes that the JAB, while finding that the exceedingly long period during which the Applicant was placed on SLWFP warrants compensation, limited its recommendation in this respect to only one month's net base salary. In the Tribunal's view, this does not constitute adequate compensation.

IV. The Tribunal will lastly turn its attention to the decision to dismiss the Applicant for misconduct and insubordination.

On 8 February 1999, the Applicant was informed that a JDC would be constituted to address the charges against him, the two main charges being insubordination and defamation, the details of which were as follows:

1. Refusal to discuss his 1995 PAR with the Resident Representative as his supervisor;
2. Refusal to submit his 1996 PAR;
3. Refusal to go on an evaluation trip to Mombasa;
4. Refusal to accompany the Officer-in-Charge to a Women's Bureau meeting in Machakos;
5. Suspension of work for a period of three weeks;
6. Refusal to participate in the in-house preparatory meeting arranged with the Ministry of Labor, Kenya;
7. Refusal to submit the "5 [Country Programme] Logical Framework".

The JDC found that regarding charges 1, 2, 4, 6 and 7, the Applicant's behaviour constituted insubordination; as for charges 3 and 5, the JDC established that these had not been proven.

The Tribunal notes that, regarding the first charge, refusal of the Applicant to discuss his 1995 PAR, the JDC had erred in determining that this charge had been proven. Indeed, the Applicant did eventually complete this PAR with his supervisor, and this PAR was ultimately the subject of a rebuttal panel and a JAB, which had been critical of the previous proceedings and had handed down a recommendation to upgrade the Applicant's rating. Therefore, the Tribunal finds that, as concerns the first charge, there was no insubordination by the Applicant.

The Applicant refused to discuss his 1996 PAR with the UNFPA Country Director because, according to the Applicant, he did not trust her ability to be fair. Subsequently, the Applicant was informed that, refusal to submit his 1996 PAR might be considered insubordination. On 12 March 1997, the MRG concluded that the Applicant's failure to submit his 1996 PAR was considered as an act of serious misconduct and of insubordination. This lead to the recommendation to separate the Applicant from service, which had been the subject of the JRB, as discussed above.

As for the remaining allegations, the Tribunal is not convinced that either party had made a strong case concerning them. However, the Tribunal does not find it necessary to address this issue and it will rely on the factual findings, as established by both the JRB and the JDC.

V. As mentioned above, the JRB concluded that, although the Applicant's behaviour amounted to "unsatisfactory conduct within the meaning of staff regulation 10.2" warranting the imposition of disciplinary measures for misconduct, "the finding of misconduct [was] not of the level that may warrant a recommendation of separation". The JDC likewise concluded that, "while these acts of insubordination were serious, they did not rise to a level that would warrant separation from service or summary dismissal". The JRB recommended that the Applicant be suspended without pay for a period not exceeding one month or an agreed separation. The JDC recommended, as appropriate sanction, demotion to the next lower level and a fine of one month's net base salary.

The Applicant submits that the decision of the Respondent to dismiss him was in contradiction to the recommendations of both the JRB and the JDC.

The Tribunal maintains that the case must be taken in its totality. On the one hand, the Tribunal noted that:

(i) The Applicant had an excellent record of service from 1980 up to 1991;

(ii) For several years, there was an ongoing campaign aimed at ending the Applicant's service;

(iii) The Applicant was unjustly placed on SLWFP for five years;

(iv) There were delays and other procedural irregularities to which the Applicant was subjected by the Administration;

(v) The JRB report indicated that the Applicant was not offered the required training, as stipulated in the PAR Guidelines.

On the other hand, the Applicant's record, during the last ten years of his service, reflects acts of insubordination and misconduct, as is evident from the conclusions reached by the JRB and the JDC. Additionally, the Applicant had been issued with a reprimand in connection with his unsubstantiated allegations. Consequently, UNDP and UNFPA did not want to continue the Applicant's service with the Organization.

As previously discussed in the context of the reprimand, the Tribunal will not normally substitute its own judgement for that of the Respondent. This principle applies also to the Respondent's prerogative in deciding on the appropriate sanction once he had determined that misconduct had occurred. However, as the Tribunal stated in its jurisprudence, there are "a number of criteria that must be met in order for a disciplinary measure not to be arbitrary, but to be regarded as in conformity with law" (Judgement No.

1011, *Iddi* (2001) referring to Judgement No. 941, *Kiwanuka* (ibid).) One of the criteria is the proportionality of the penalty imposed. In reaching its decision, the Tribunal has to balance the conflicting considerations in the Applicant's case. Having considered all the issues of this case, and having noted the conclusions reached in this matter by both the JRB and the JDC, the Tribunal finds that the Respondent's decision to dismiss the Applicant from service was disproportionate to the acts of insubordination with which he was charged. The Tribunal, however, is of the opinion that, under the present circumstances, reinstatement of the Applicant in service would not be a practical solution and that compensation is the appropriate remedy in the Applicant's case.

VI. The Tribunal has noted the Administration's practice of imposing on staff members SLWFP for extended periods of time. This practice of the Respondent's has been evident over the years (see, for example, Judgments No. 92, *Higgins* (1954); No. 215, *Ogley* (1976); No. 812 *Everett* (1997); No. 925 *Kamoun* (1999); and, No. 1172 *Ly* (rendered during this session), in addition to the present case.)) Such measures cost the Organization a considerable amount of money in addition to the moral and material damage inflicted on staff members.

The Tribunal finds this practice to be extremely disturbing. In this context, the Tribunal recalls General Assembly resolutions 53/221 dated 23 April 1999, and 55/258 dated 27 June 2001, both entitled "Human Resources Management", which include, inter alia, the principle of accountability, both personal and institutional. The Tribunal wishes to remind that it is the Administration's obligation to safeguard its funds, which are made available in order to allow for the smooth functioning of the Organization through its various branches. To this end, the Administration should not resort to measures such as SLWFP, except in exceptional circumstances.

VI. In conclusion, the Tribunal finds that the Respondent's decision to dismiss the Applicant from service was disproportionate. The Tribunal also finds the Respondent's decision to place the Applicant on SLWFP, from 25 April 1997 until 8 April 2002, to be unacceptable and in gross violation of the Applicant's rights.

VII. In view of the foregoing, the Tribunal:

1. Orders the Respondent to pay the Applicant, as compensation, an amount equivalent to 18 months' net base salary at the rate in effect on the date of this Judgement; and,
2. Rejects all other pleas.

(*Signatures*)

Brigitte Stern
Vice-President, presiding

Omer Yousif Bireedo
Member

Spyridon Flogaitis
Member

Geneva, 23 July 2004

Maritza Struyvenberg
Executive Secretary